



# PRIMARY JUSTICE RELOADED:

## A MODEL FOR LOCALISED PROBATION SERVICES



## **Report Author**

Glyn Gaskarth, Policy Manager, LGiU

The LGiU is the largest, most influential think-tank and membership organisation operating in the space between Town Hall, Whitehall, Westminster and communities. Now in its 29<sup>th</sup> year, the LGiU continues to make a significant impact on the public policy scene. In 2008 the LGiU was awarded the Public Affairs News Award for think-tank of the year.

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# CONTENTS

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UNISON FOREWORD	5
INTRODUCTION	8
Background	8
What does the Probation Service do?	8
The role of Probation Trusts	9
SECTION ONE	9
Why is the Government proposing the reform of the Probation Service?	9
SECTION TWO	11
What are the proposed reforms?	11
How many Probation Trusts are there and how are they constituted?	13
Functions maintained by public sector Probation Trusts	13
The purchaser/provider split	14
Competed probation services for lower risk offenders	14
Payment by results	14
The role of punishment	16
Enforcement	17
Restorative Justice, women offenders and sobriety schemes	17
SECTION THREE	19
What issues do the reforms raise?	19
Will cost savings from the amalgamation of Probation Trusts into larger commissioning units actually be achieved?	19
Why is a purchaser and provider split necessary in probation but not in prisons?	20
The Government does not trust local authorities to procure probation services yet	20
Probation Trust amalgamations will complete a process of centralisation that has made probation services less locally accountable	21
Police and Crime Commissioners (PCCs) – potential competitor for local representative voice	21
Will payment by results prevent the creation of a diverse market of suppliers in public services?	22
Can public sector bodies assume financial risk and if not how can they bid to perform services?	22
Staff conditions and training	23
Probation Trust amalgamations could adversely affect offenders' ability to access specialist support services	24
The Government's proposed punishment options do not include additional powers for local authorities to introduce further penalties on offenders	24

Were community payback and the Work Programme a trial run for this approach?	25
Is the Work Programme a good model for these reforms?	25
Is there a tension between the 'Big Society' and the 'Total Place' elements of these planned reforms?	26
 SECTION FOUR	 26
What is Primary Justice?	26
The case for a greater local authority role	27
 CONCLUSION	 29
 BIBLIOGRAPHY	 30

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## **UNISON FOREWORD**

UNISON represents five thousand staff working for Probation Trusts in England and Wales. Our members work as offender managers, community payback supervisors, approved premises managers, case administrators, victim liaison officers and many, many more vital roles. Our members are committed to the delivery of high quality public services which are directly provided by the public sector and accountable to the communities they serve.

Primary Justice provides a real alternative view on how the Justice System, and Probation in particular, could be operated at a local and accountable level at a time when regionalisation, privatisation and the centralisation of decision-making appear to be the dominant driving forces. The Ministry of Justice and the National Offender Management Service have struggled to reconcile these trends with Government's stated commitment to localism. Primary Justice provides a potential template to build a truly local, accountable Probation Service.

By fostering greater cooperation among the various public sector bodies that are working in the field of community justice, the principles of Primary Justice might help to bring clarity to the question of how localism and the future of the Probation Service might come together. By pooling public sector resources, by working more effectively and smarter, with less barriers and by addressing the concerns of the community through genuine democratic accountability, a long term strategic vision for Probation could be secured.

In 2012 we have a series of, poorly connected proposals for reform within Justice Services most notable being the introduction of Police and Crime Commissioners, and the publication of the Government's consultation paper on the future of Probation Services in England and Wales: 'Punishment and Reform: Effective Probation Services.'

The Probation Service stands at a cross roads: one way lies a fragmented, regionalised service with mega-Probation Trusts and cross-regional commissioning of huge contracts; the other way, the potential for a truly local, accountable Probation Service with local commissioning and public/public partnerships. Probation remains largely, although not exclusively, a public sector organisation with a strong ethos of effective offender management for the public good and not for profit. UNISON intends that Probation should stay this way.

The challenges set out in 'Punishment and Reform' are immense. Probation services are faced with significant and continued reductions in resources. They face the threat that many of the services they have provided, including low to medium tier offender management, will be subject to competition, and a real ...

drain on productive resources by having potentially to engage in new bureaucratic methods to secure work and remain viable organisations in a competitive market.

The competing of probation work has many dangers. The government makes it clear that it believes that competition will deliver the efficiency and productivity gains that they are seeking, and yet provide little or no evidence to support this. In reality, privatisation is likely to bring a fragmented workforce, the erection of commercial barriers, the creation of silos, less skilled and poorly trained operatives engaged with offenders and the profit motive paramount in decision making. Critically, the Government's proposals for probation could see local probation services withdrawing back into the safety net of those few statutory services reserved for the public sector (court reports etc). This will lead ultimately to the demise of Probation, as Trusts retrench to become small organisations with little community focus or engagement with partners, unable to play a significant role or be a key player around the table.

UNISON supports an alternative vision. This vision is based on bringing the skills of probation services and its skilled and trained workforce to work in ever greater partnership with other accountable public bodies. It is about unlocking the potential of co-commissioning work within the public sector to produce the right results and to re-invest the rewards back into ever greater improvements and local community gain.

What is clear about crime and social disorder is that many public services are involved both in prevention but also in dealing with the aftermath. It has been the great prize of policy makers in the justice field to move expenditure from dealing with the consequences of crime to preventing it in the first place. This shift of resources has yet to be comprehensively achieved and it will ever be so unless public sector partners truly work together in a holistic way, sharing resources and risk. Housing, employment, skills and training, policing, social welfare, drug/alcohol treatment, licensing, protection, probation and courts are all locally delivered services which could be operated in a more cooperative way to enable partnerships which produce positive results for all concerned. The fiscal rewards alone would be significant through reduced short term prison numbers.

The government has opened the door to looking at a range of options where probation delivery is concerned. The commissioning of probation services will be a key battleground and it is here that local authorities could have a huge role to play in driving public sector partnerships in which probation plays a ....



leading role. Indeed UNISON can see many good reasons why this should be the de-facto position and not simply accept the outsourcing model.

In recent years we saw the concept of partnership working enshrined in the Total Place pilot areas. These arrangements sought to deliver partnership working amongst providers across a very broad front of delivery within a geographical community. Whilst not perfect in all respects, particularly around some of the employment models promoted, these partnerships were effectively discontinued under the coalition government before their value could be fully realised. At present a range of smaller formal partnerships are enshrined within arrangements like MAPPA (multi-agency public protection arrangements) and IOM (integrated offender management). These arrangements are successful.

Clearly what is now required is a much stronger case being put forward to unlock the potential of public sector partnerships. These partnerships increase the capital available to manage the current situation of resource cuts. Savings and efficiency can be driven by sharing services and functions like estates and asset management. Partnership procurement could drive down costs of goods and services and savings re-invested into providing a more complete operational service. Without profits being extracted from the available resource all of this could be targeted at further operational improvements. All partners have a vested interest in making these partnerships work for the benefit of local communities. They make sense. Now is the time to deliver them.

Ben Priestley  
National Officer  
UNISON Police and Justice

Matthew Lay  
Chairperson  
UNISON National Probation Committee

## INTRODUCTION

### *Background*

The Ministry of Justice (MOJ) is consulting on plans to reform the Probation Service and community sentencing. These proposals are contained in two consultations; *Punishment and Reform: Effective Probation Services* and *Punishment and Reform: Effective Community Services*. Our briefing paper is divided into four sections:

- The first explores why the Government is proposing reform.
- The second summarises the two consultations and explains what the plans are.
- The third considers the issues these reforms raise.
- The fourth examines the case for an expanded role for local authorities focusing on investments in primary justice.

Primary Justice requires greater local authority investment in early prevention and rehabilitative schemes to divert people from offending. It assigns upper tier local authorities the budget for lower risk offenders. Councils will be given the power to coordinate prisons, probation and local social services to reduce reoffending, breaking down the barriers between these services. We advocate that councils invest a greater proportion of their budget into early prevention initiatives concentrating on dealing with the housing, employment and addiction factors that can affect offenders' propensity to commit crime. These proposals are contained in the All Party Parliamentary Group for Local Government (APPG) Report *Primary Justice: An inquiry into justice in communities* which we authored in 2009. We explore them more fully in section four.

### *What does the Probation Service do?*

The term probation derives from the Latin, *probatio*, "testing". The Probation Service supervises offenders sentenced to a community sentence, released on licence or on parole until they are deemed fit to fully re-enter the community. The Criminal Justice Act 2003 defined the purposes of sentencing as: the punishment of offenders; crime reduction; the reform and rehabilitation of offenders; the protection of the public; and the making of reparation by offenders to persons affected by



their crimes.<sup>1</sup> The Probation Service should fulfil each of these in the performance of its duties. The Government's consultations contain elements of each but focus on making community sentences more punitive and increasing the value for money provided by the Probation Service.

### *The role of Probation Trusts*

The Secretary of State has established Probation Trusts to commission local Probation Services on the Minister's behalf.<sup>2</sup> They are funded by the National Offender Management Service (NOMS), to whom they are accountable for delivery. The first Probation Trusts were established in April 2008 (Merseyside, South Wales, Humberside, Dyfed/Powys, West Mercia and Leicestershire & Rutland). Services delivered by the Trusts include bail and court work, offender management, post-release supervision, residence requirements, drug rehabilitation, alcohol treatment, mental health treatment requirements, assessments and reports, supervision and activity requirements, offending behaviour programmes, community payback (unpaid work) requirements, approved premises and victim liaison. Probation also provides pre-sentence reports for the courts to inform sentencing, assesses offenders in prison and works with victims of violent and sexual crime.

## **SECTION ONE**

### **Why is the Government proposing the reform of the Probation Service?**

There appear to be four main reasons the Government is proposing these reforms. They wish to reduce expenditure on the Probation Service to contribute to deficit reduction, enhance public confidence in the Probation Service and reduce the rate of reoffending. They need to increase the productivity of the Probation Service so it can manage an increase in its caseload. The MOJ are encouraging the courts to divert lower risk offenders from short term sentences to serve community sentences. These are the reasons the Government believes there needs to be reform. Clearly some may disagree with these points but their influence on government thinking is clear.

- 1. The government deficit is too high, total debt is still increasing and the government have outlined a programme of tax increases and spending cuts to reduce the deficit***

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<sup>1</sup> *The Role of the Probation Service*, Justice Committee, House of Commons, July 2011

<sup>2</sup> *The Offender Management Act 2007*

Reductions in the probation budget are part of a programme of cuts to Government spending designed to reduce the budget deficit, which was £126 billion in 2011/12 or 8.3 per cent of GDP.<sup>3</sup> While the deficit is declining the total debt is set to rise to 76.3 per cent of GDP by 2014/15 before declining. The Government have set a target to eliminate the structural deficit by 2014-15.<sup>4</sup> Reforms to probation need to be seen in the context of reducing this deficit. Spending reductions in the MOJ amount to almost 25 per cent of the total budget.<sup>5</sup> The 2010 comprehensive spending review predicted almost 10,000 staff reductions in the National Offender Management Service (NOMS) in both prisons and probation.<sup>6</sup> The Government believes that by increasing competition in the provision of probation services they can deliver better value for money.

## ***2. Public confidence in the criminal justice system and community sentencing in particular is low***

The Government believes that public confidence in community sentencing is low. Kenneth Clarke QC MP in the Ministerial Foreword to the consultation on probation writes that community sentences “*fail to command public confidence as an effective punishment.*” Policy Exchange research indicates “*half of the public (49%) are opposed to community sentences being used as an alternative to short-term prison sentences.*”<sup>7</sup> Any attempt to divert low risk offenders from short prison sentences to community sentences therefore requires a robust community sentencing framework which commands public support. The existing system does not provide this so reform is needed.

## ***3. Reoffending is too high***

Both the prison and probation systems are failing to rehabilitate offenders. Reoffending rates are “*unacceptably high.*” “*Almost half of all adult offenders reoffend within a year of leaving custody*” and reoffending by offenders sentenced to less than 12 months in prison costs the economy an estimated £10 billion per annum.<sup>8</sup> Over a quarter

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<sup>3</sup> Office for National Statistics, [Public Sector Finances, Statistical Bulletin](#), March 2012,

<sup>4</sup> HM Treasury, [Budget 2012](#).

<sup>5</sup> The Telegraph, [Spending Review 2010 Winners and Losers](#),

<sup>6</sup> Ministry of Justice, [Impact of the SR Settlement on Staff](#), October 2010.

<sup>7</sup> Policy Exchange, [Fitting the crime, Reforming community sentences: Mending the weak link in the sentencing chain](#), Robert Kaye, 2010.

<sup>8</sup> Punishment and Reform: Effective Community Sentences

of those given community sentences fail to complete them due to breaches of the conditions.<sup>9</sup>

#### **4. The Probation Service lacks the capacity to deal with an increase in community sentencing without reform**

The MOJ argue that “*there is no consensus on how outcomes following community sentences and those following custody should be compared.*”<sup>10</sup> A recent review of the quality of probation services highlighted there is “*relatively little literature directly addressing ‘quality’ in 1-1 probation practice.*”<sup>11</sup> This makes it difficult to assess the productivity of investment in either community sentencing or probation.

What is certain is that senior probation employees doubt the service has the capacity to absorb the increase in community sentences. A Channel 4 survey of Probation Service Trust heads revealed only three out of the twenty Probation Chiefs that responded believed the service had the capacity to cope with a move from short custodial sentences to more community-based sentences.<sup>12</sup> Fifty per cent of Probation chiefs described their current capacity to manage offenders in the community as either “*average*” or “*poor*.” Competition is being introduced, the Government claims, to more effectively employ public resources, increasing capacity without increasing expenditure.

## **SECTION TWO**

### **What are the proposed reforms?**

On the next few pages we explore the major policy changes contained in each of the two consultation papers; *Punishment and reform: effective probation services* and *Punishment and reform: effective community sentences*. We summarise the major policy proposals and suggest how they will affect existing practices and delivery structures.

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<sup>9</sup> The Role of the Probation Service, [Reforms to community sentences](#), Justice Committee, House of Commons,

<sup>10</sup> Ministry of Justice, Response to the Justice Committees Report on the role of probation

<sup>11</sup> Ministry of Justice, [The quality of probation supervision: A literature review, summary of key messages](#), 2012

<sup>12</sup> Channel 4, [Probation chiefs’ public protection warning](#), 31 August 2010.

## Punishment and reform: effective probation services

**This consultation by the MOJ seeks opinions on the following proposed reforms:**

- The establishment of a clear purchaser/provider split in the provision of probation services with a strengthened role for Probation Trusts as commissioners of probation services.
- The creation of a mixed market in probation services for lower risk offenders with increased involvement of the private and voluntary sectors in delivering services.
- Maintaining key public interest decision points for all offenders in public sector control including court advice but commissioning probation services for lower risk offenders on a payment by results basis.
- Development of new oversight models for probation possibly including councils and Police and Crime Commissioners (PCCs) in the long term and the encouragement of joint commissioning with partners such as councils, the NHS and the police.
- New measures to ensure there is “*a clear punitive element in every community order handed down by the courts*” and increasing the use of financial penalties alongside community orders.
- Exploring opportunities for Probation Trusts to be given control of the estates services they receive and the property they use from 2013.
- Transfer of commissioning functions from the National Offender Management Service to Probation Trusts including the budgets for community based offender management services, specified probation services, supervision of lower risk offenders
- Making Probation Trusts accountable through contractual arrangements with NOMS, for working for PCCs

## **How many Probation Trusts are there and how are they constituted?**

The Government expect that *“probation delivery structures will continue to be consistent with local authority and police force areas and that Trusts will continue to ensure arrangements support this.”* Consistency with local authority and police force areas does not mean the Government are committing themselves to operate a Probation Trust in each local authority; regional Probation Trusts would be consistent with this pledge. Probation Trusts were formed in 2008 but the report says people should *“anticipate that there may be fewer Probation Trusts than now.”* This is because the *“eventual number and size of trusts”* needs to ensure *“sufficient purchasing power.”* They continue *“we do not necessarily propose to organise this competition in lots matching the shape and size of the current 35 Probation Trusts. This may not offer a model that is particularly efficient....The difference in size and scale of Trusts may mean that competition for even the majority of the business of smaller Trusts would be unattractive to the market.”* The MOJ seem intent on amalgamating Probation Trusts into larger commissioning units to attract more bids from the private sector.

## **Functions maintained by public sector Probation Trusts**

These consultations are the *“first phase”* of the Triennial Review process of Probation Trusts. This review process considers whether services should continue to be delivered by public bodies and if delivery mechanisms are robust. The continued existence of Probation Trusts is therefore uncertain. It is possible that local bodies could assume the role currently held by Probation Trusts.

The new proposals reveal that Probation Trusts will retain *“certain ‘public interest’ decisions for all offenders”* for the time being. They will *“conduct the initial assessment of all offenders and determine the level of management they need at this stage based on their risk.”* Probation Trusts retain responsibility for supervising higher risk offenders. The proposal is to *“compete the offender management of lower risk offender’s only.”* Other services retained by Probation Trusts include advice to court and the parole board, determining reduced levels of offender management, resolution of recalls and breaches, early revocation of sentences for offenders for good progress and participation in supervision and management decisions about Multi Agency Public Protection Arrangements (MAPPA) cases.

## ***The purchaser/provider split***

The consultation document makes it clear that *“Probation Trusts may choose to compete for services.”* The open public services paper gives the public sector a right to bid or request to take over their services and the MOJ promise they *“will provide specific support for justice sector staff if appropriate.”* The consultation does require that public sector bodies bidding to perform these services become separate from the Probation Trust.

To prevent conflicts of interest a firm purchaser/provider split is being proposed for probation services. Probation Trusts which seek to compete for services will be required to *“become separate entities.”* The proposals require a full *“purchaser-provider split.”* Probation Trusts bidding to run services must *“become separate entities, independent of those Probation Trusts which are responsible for commissioning, giving advice to court, managing higher risk offenders and taking public interest decisions.”*

## ***Competed probation services for lower risk offenders***

The MOJ believe the Probation Trusts currently enjoy a *“near-monopoly”* on providing probation services. The proposals extend *“the principle of competition,”* an aim of the Offender Management Act 2007 which the Government *“do not believe ... has so far been met.”* The MOJ want a *“stronger role for public sector Probation Trusts as commissioners of competed probation services.”* Probation Trusts will be given an *“enhanced commissioning role”* with the devolution of the budget for community offender services and women’s services (the latter from 2013-14). They will be asked to *“open to competition all probation services not directly provided by Probation Trusts.”* The Government wants to *“move to a model where, over time, every service will be competed unless there are compelling reasons why it should not be.”*<sup>13</sup> If implemented, services to be contracted out would amount to *“around 60% of the budget for community offender services of £1 billion per year.”*

## ***Payment by results***

The MOJ have pledged to apply the principle of payment by results to all providers of probation services by 2015. Pilots have begun in two private prisons; two pilots in public prisons begin this year. The MOJ wish to *“strengthen [the] commissioning arrangements in probation.”* Looking at

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<sup>13</sup> Ministry of Justice, [Competition Strategy for Offender Services](#), July 2011.



*“how we assess what services are needed to protect the public and reduce reoffending; how we plan and buy those services; and then how we review their delivery and effectiveness.”* Probation services for lower risk offenders will be *“increasingly incentivised through payment by results to reduce reoffending.”* It is not clear if this payment by results system refers to a provider’s profit margin or will include project costs.

A scheme where operators that fail can’t recover their costs would reduce interest among smaller suppliers. The Government recognise the *“need to draw on small and medium sized enterprises and the voluntary sector”*<sup>14</sup> and want to *“bring in a wider range of organisations from the private, voluntary and community sectors, alongside the public sector, to compete to provide probation services for offenders.”* The Government aim to *“level the playing field for the voluntary sector in line with the renewed compact between government and voluntary sector.”* In *Breaking the Cycle* the MOJ realised the need to *“consider the specific barriers for these smaller providers”* and will *“identify options which will best enable them to be part of a dynamic mixed market of provision.”*<sup>15</sup>

### **Punishment and reform: effective community sentences:**

This consultation seeks to provide effective community sentences with an implicit aim to divert lower risk offenders from short term prison sentences. The MOJ seeks opinions on reforms designed to achieve the following:

- Establish community sentences as an effective punishment which enjoys public confidence through *“a clear punitive element in every community order handed down by the courts.”*
- Create a *“robust and intensive punitive community disposal, which courts can use”* with confidence including community payback, restrictions on liberty e.g. electronically monitored curfew, exclusion, a driving ban, a fine or a foreign travel ban.

<sup>14</sup> Punishment and Reform: Effective Probation Services

<sup>15</sup> Ministry of Justice, *Breaking the cycle, Effective Punishment, Rehabilitation and Sentencing of Offenders*, 2010

- Consider introducing a right for victims to request a restorative justice (RJ) programme where they can confront the offender and inform them how the crime affected their life.
- Grant offender managers the right to award financial penalties for offender breaches of a community order without reference back to court in addition to their rights to issue a warning or refer back to court
- Strengthened duty on courts to consider imposing a compensation order and remove upper limit on fines in magistrates courts
- Increase access to treatment for offenders with alcohol, drug or mental health problems to deal with the underlying causes of their behaviour and remove the restrictions on the duration of drug and alcohol rehabilitation requirements.

### *The role of punishment*

The MOJ recognise *“there is currently no obligation on the courts to select a requirement which has punishment as its primary purpose.”* The proposals ask if *“every offender who receives a community order should be subject to a sanction which is aimed primarily at the punishment of the offender.”* The consultations seek clarification as to what requirements can be regarded as punitive and whether fixed penalty type schemes could be a viable option.

The MOJ propose the creation of more intensive community sentences which will *“build on”* the Intensive Alternatives to Custody (IAC) pilots. These pilots ran from 2008/09 to 2010/11. IAC gave offender managers greater flexibility in managing breaches and provided more intensive supervision of offenders. They were judged more appropriate for offenders with *“chaotic lifestyles, multiple needs, previous custodial sentences and motivation to change.”*<sup>16</sup> The specified aim of the IAC was to *“to deliver cost-effective alternatives to custody.”* These pilots look set to shape the probation services contracted.

<sup>16</sup> Ministry of Justice, [Evaluation of the Intensive Alternatives to Custody Pilots](#),

## **Enforcement**

The Government wants to expand the range of tools offender managers have to deal with infractions. The Legal Aid, Sentencing and Punishment of Offenders Bill removed the upper limit on fines for offences triable summarily or either way in Magistrates Courts. Curfew times attached to community orders have been increased from a maximum of twelve hours a day to sixteen hours per day and their maximum duration extended from six to twelve months. This consultation asks if offender managers should be given the right to award financial penalties for failure to comply with an order in addition to their existing power to issue a warning or refer back to court.

The report recognises that “*some sentencers also lack confidence that fines will be enforced.*” Electronic monitoring is currently used to enforce curfews. The consultation asks if it can be used to monitor other conditions of community sentences including exclusion requirements (e.g. preventing an offender visiting the victim’s home), alcohol abstinence pilots, residence requirements and the foreign travel ban. These moves merit consideration, but the separation of contracting responsibilities for electronic monitoring (centrally commissioned) and offender management (locally commissioned) may frustrate implementation.

The report also wants to make existing enforcement actions more effective and explore “*what more can be done through the existing framework.*” The courts have an ability to issue warrants of distress to confiscate the assets of offenders who have defaulted on payment. Pilots in Merseyside, Cheshire and Cambridgeshire have sought to increase compliance by reducing the period in which bailiffs have to execute a warrant from 180 to 30 days. The consultation considers whether courts should be given the right to confiscate property as a punishment. Such punishments would need to be equitable for those on high and low incomes. The report asks whether this punishment is more suitable for particular offenders/offences. The MOJ recognise that better data sharing between MOJ and Her Majesty’s Revenue and Customs is needed to verify offenders’ income to make this work.

## **Restorative Justice, women offenders and sobriety schemes**

In 2009 the LGiU advocated greater use of restorative justice (RJ) approaches in our APPG Report *Primary Justice: An Inquiry into Justice in Communities*. Restorative approaches involve the offender agreeing to undertake some reparation to the victim which could be monetary or

an action, the offender can also meet with the victim to discuss the crime and give the victim an opportunity to explain the affect it had on them. Since then 18,000 police officers have been trained in the use of restorative approaches in England and Wales. This has led to a fourteen per cent reduction in the frequency of reoffending and high victim satisfaction (eighty five per cent reported that they were satisfied). The Government declare they are “*committed to making more use of RJ*” but not in a way that is “*over prescriptive.*” The MOJ want “*local areas to be able to commission RJ services which are of direct benefit to them.*”

RJ provides a mechanism to provide restitution for victims. Reforms may be made to the Victims’ Code to give victims an entitlement to request RJ. These proposals were contained in the Governments’ Victims’ Strategy *Getting it right for Victims and Witnesses*. Probation Trusts are to encourage the use of RJ in their pre-sentence reports. To do this the institutional structure needs to be put in place. £1 million of funding is being provided to Restorative Solutions CIC to train one thousand prison and probation staff to become restorative justice facilitators and provide support. £130,000 is being given to Thames Valley Partnership – Restorative Justice Services to create best practice templates for face to face conferencing in prison and probation services. The Restorative Justice Council is piloting its Skills for Justice Diploma and establishing a list of practitioners. The MOJ propose to develop Neighbourhood Justice Panels to bring together offenders, victims and representatives of the community to deal with low level crime. This measure is based on schemes currently operating in Somerset, Sheffield and Norfolk.

Investment in early prevention schemes to tackle drug, alcohol addiction and mental health issues can prevent reoffending. The Legal Aid, Sentencing and Punishment of Offenders Bill increases access to treatment for offenders with mental health, alcohol or drug problems and enacts the reform agenda set out in *Breaking the Cycle*. Community order requirements include access to alcohol treatment, drug rehabilitation, programme, activity, attendance centre, exclusion, prohibited activity, supervision, curfew, mental health treatment, residential, community payback a foreign travel ban and alcohol abstinence and monitoring equipment (later two introduced by the Legal Aid, Sentencing and Punishment of Offenders Bill). The Government is proceeding in a piecemeal way by operating a small number of local pilots.

Compulsory sobriety schemes are being considered. They operate in South Dakota, USA. The scheme requires the offender to attend a designated place for twice daily testing, pay for each test, if they fail the

test they are referred to court and the judge can then sentence them. This approach will be trialled in two areas in cases where there is a clear link between alcohol and the offending behaviour. The MOJ are not considering applying the sobriety or exclusion orders to offenders whose alcohol problems may be adversely affecting their lives but not involved with the direct offence.

The MOJ give a commitment to “*take into account the different profile of women’s offending.*” The requirement to provide gender specific services is to be “*built into the fabric of every probation trust.*” This new emphasis is partly because fewer women are receiving community orders than men though they are more likely to successfully complete a community sentence. Four women only intensive treatment centres are being developed in Wirral, Bristol, Birmingham and Tyneside to tackle drug and mental health problems.

## **SECTION THREE**

### **What issues do the reforms raise?**

In this section we explore the practical impact of these reform proposals and how local authorities’ role could be enhanced. Councils are an essential provider of local services with expert knowledge of their local area. These proposals would benefit from leveraging the role of councils as elected representatives accountable to local citizens. We will explore what a greater local authority role would mean in practice.

### ***Will cost savings from the amalgamation of Probation Trusts into larger commissioning units actually be achieved?***

Probation Trust amalgamations are being justified on the basis of the need to attract private suppliers. The Government need to provide estimates of the amount they seek to save through any amalgamations as they assume this measure will deliver cost savings, but no evidence is provided. We need reliable estimates of how long this restructuring will take because this period could distract from service delivery and frustrate the development of local partnerships. We also need estimates of the likely costs of possible amalgamations including the number of redundancies. Workforce restructuring around Trust mergers will raise significant employment relations issues.

## Why is a purchaser and provider split necessary in probation but not in prisons?

This separation imposes significant costs and delays to public sector bids for probation services. The Government does not operate such a separation in prisons. NOMS operates “*ethical walls*” between commissioning and provider parts preventing disclosure of information in prison competitions. Competition in Prisoner Escort and Custody Services is already happening without a purchaser/provider split.

## ***The Government does not trust local authorities to procure probation services yet***

Councils will be pleased to hear there “*may be potential*” for other public bodies “*such as local authorities or, with a broadened statutory role, Police and Crime Commissioners to take responsibility for probation services.*” They also “*support the joint commissioning of services for offenders between probation and key partners such as local authorities, health and the police.*” However, the appetite to commission both probation and prison places at a local level is clearly lacking.

In the MOJ’s response to the Justice Committees’ report on probation they stated “*the recommendation .. that all sentences, whether to be served in custody or in the community, should be commissioned at local level – may not give enough weight to the difficulties and intense pressures involved in providing custodial places, which the existing system manages very effectively.*”<sup>17</sup> The London riots were cited as an example of a case where local arrangements would have been overwhelmed. Given the unique nature of the riots the Government appear to be using an exceptional circumstance to justify a permanent loss of power for local authorities.

The MOJ have already centrally commissioned community offender services representing 25% of the £1 billion annual budget including electronic monitoring, bail accommodation and support and centrally out sourced estates, facilities and IT contracts. It is not clear that central government has greater expertise than local government in procurement. The debacle over efforts to create a new NHS patient record system, a £12.7 billion scheme, which was later abandoned due to cost overruns and delays, don’t indicate any superiority of central government procurement.<sup>18</sup>

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<sup>17</sup> Ministry of Justice, [The Government’s Response to the Justice Committees’ Report the Role of the Probation Service](#), October 2011.

<sup>18</sup> The Guardian, [NHS told to abandon delayed IT project](#), September 2011.



The MOJ declare that in the long term they will “*explore opportunities*” to give councils power over “*the estates services they receive and the property they use*” but the existing structure will remain in place until 2013. Councils cannot explore co-location until they are certain of the borders of their potential public sector partners. Probation Trusts could be more effective at collaborating with local partners if they could commission IT and estate services in partnership with local bodies. IT systems once commissioned at a central level are expensive to change.

***Probation Trust amalgamations will complete a process of centralisation that has made probation services less locally accountable***

Probation Trusts are another step in the gradual centralisation of probation services. The Probation of Offenders Act 1907 made it possible for Magistrates' Courts to appoint probation officers who were paid by the local authority. Until 2001 probation areas matched local authority areas and in 2001 twenty per cent of their funding came from the local authority. The establishment of 42 probation boards (down from 54 probation areas previously) had the virtue of matching the number of police forces in England and Wales. Probation Trusts were established to replace probation boards from 2007/08. Now there are thirty five Probation Trusts. They match neither the number of local authorities nor the number of police forces. The requirement to have two Magistrates on Probation Boards was not continued with the establishment of Probation Trusts. Appointments to Probation Trusts are approved by the Secretary of State. All financial penalties for breach of community orders remain payable to the Exchequer not to local bodies. Probation Trusts are accountable to the Secretary of State and not local communities.

***Police and Crime Commissioners (PCCs) – potential competitor for local representative voice***

The Government has created the position of Police and Crime Commissioner (PCC). Probation Trusts are accountable “*through their contractual arrangements with the National Offender Management Service (NOMS), for working with Police and Crime Commissioners.*” Probation Trusts will need to cooperate with PCC's from November 2012. The Secretary of State remains accountable for ensuring probation services but the proposals are undecided on whether “*other public bodies, such as local authorities or, with a broadened statutory role, Police and Crime Commissioners .. [could] take responsibility for probation services*” in the long term. This creates an unhelpful

competition between councils and the PCC to assume power over the budget of Probation Trusts.

A more effective means of ensuring local accountability would be to grant both the PCC and local councils positions on the boards of local Probation Trusts. These local elected bodies would then be able to ensure Probation Trusts commissioned services consistent with the other services provided by local government. This measure could improve Probation Trusts and should be adopted if the Government reject our proposal to give local authorities a greater role in commissioning local probation services.

### ***Will payment by results prevent the creation of a diverse market of suppliers in public services?***

Payment by results raises the question of what results we aim to achieve. Public protection is a key aim of the Probation Service. It is barely mentioned in these consultations. The MOJ is contributing to eight Drug and Alcohol Recovery Pilots being trialled by the Department of Health. In these pilots *“a proportion of the participating Trust’s funding will be placed at risk, with payment dependent on the successful rehabilitation of offenders.”*<sup>19</sup>

Success is judged as a reduction in the rate of reconvictions. There is the potential for additional payments if the schemes overachieve but no payment will be made if the reconviction target is not met. The inclusion of public protection indicators in the payment by results assessment would enable smaller providers to bid with greater confidence than indicators solely dependent on offender rehabilitation.

The proposals do not account for whether smaller providers will have the capacity to assume the financial risk of project failure. Increasing the contract size through commissioning in larger probation areas will encourage large private sector providers to bid but may prevent smaller and more local bodies that lack the capacity to fulfil large contracts.

### ***Can public sector bodies assume financial risk and if not how can they bid to perform services?***

Contracting out services allows the Government to transfer financial risk to providers but public sector providers cannot yet assume this financial risk. In *Punishment and Reform: Effective Community Sentences* the MOJ highlight a pilot project to focus on offenders in the community,

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<sup>19</sup> Ministry of Justice, [Punishment and Reform: Effective Community Sentences](#)

under the management of the Wales, and Staffordshire and West Midlands Probation Trusts. A certain proportion of the payment is dependent on reducing the rate of reconviction. The MOJ recognise that as “this approach requires the transfer of financial risk from the Government to the provider, the two public sector Probation Trusts cannot directly engage in their current form.”<sup>20</sup> This pilot will “test how novel commercial and contractual arrangements between Probation Trusts and partners from outside the public sector can enable probation services to be delivered on a payment by results basis.”

Clarification on how public sector entities can assume financial risk is needed before payment by results can be implemented. The MOJ state that the pilots will be subject to an independent evaluation and will “*inform our strategy for applying payment by results principles more widely to offender services.*” This pilot will begin in 2013 and operate for up to four years. The Government will begin “*applying the principles of payments by results to all of these providers by 2015.*”<sup>21</sup> Clarification on how public sector Probation Trusts can assume financial risk will be delayed until 2017. By the time public sector providers are aware of how they can meet the requirement to assume the financial risk these contracts may have already been awarded.

### **Staff conditions and training**

Probation is a skilled profession. It requires trained staff. The Government wants to be “*less prescriptive*” about national standards for probation staff and to “*give providers further discretion and freedom over the design and delivery of services.*” Involving a diverse range of suppliers is likely to require the training of additional practitioners. Any employer can send their staff to be trained through the Probation Qualification Framework. This expenditure, while undertaken by private or voluntary entities, would need to be recouped in the contract price. The MOJ must balance their desire to minimise the barriers to entry of new potential bidders with the need to ensure trained probation staff.

Pilot providers are to be granted “*new freedoms and flexibilities, to allow them to develop and introduce innovative service delivery models*” but as is the case “*any transfers of staff as a result of competitions would be subject to the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) and the principles of ‘Fair Deal.’*” Some tasks may also be mechanised. In Bexley and Bromley offenders will report to electronic kiosks, identified by biometric data they will answer questions

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<sup>20</sup> Ministry of Justice, [Punishment and Reform: Effective Community Sentences](#), P38

<sup>21</sup> Ministry of Justice, [Punishment and Reform: Effective Probation Services](#)

at an electronic portal.<sup>22</sup> How this will achieve the proposal of the Carter Report to increase offender/offender manager contact remains to be seen.

HM Chief Inspector of Prisons will inspect private providers of probation services as they do with existing public sector providers. We would advise that they include assessment of offender manager/offender contact and the level of professional development of service staff in their assessments of service provision. A greater stress on the public protection responsibility of the Probation Service also seems appropriate.

### ***Probation Trust amalgamations could adversely affect offenders ability to access specialist support services***

Amalgamating Probation Trusts to operate at a regional level combined with the development of a few specialist centres could result in offenders having to travel many miles for supervision. This may reduce the likelihood of an offender successfully completing the community order. Devolving the budget for services to female offenders to local authorities would allow for much greater experimentation allowing us to identify which schemes are more effective. Aiding the development of specialist services is welcome but local authorities could contract these services at a local level.

### ***The Government's proposed punishment options do not include additional powers for local authorities to introduce further penalties on offenders***

The policy of the treasury retaining income from fines is regrettable. Income from financial penalties could be retained by local authorities or Probation Trusts. These resources could be diverted into early prevention schemes which could reduce reoffending. There is no mention of involving local authorities and allowing them to award financial penalties from the benefits they administer such as housing benefit and council tax benefit. The LGiU believes councils should have the option of reducing the welfare benefits offenders receive. This could be a more cost effective mechanism than awarding a fine which then requires costly enforcement action. It would also play a useful role in reminding offenders of their responsibilities to the wider society and the limits to the local community's indulgence of their criminality.

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<sup>22</sup> The Guardian, [Probation Officers to be replaced by electronic kiosk in pilot scheme](#), 28 April 2012.

## *Were community payback and the work programme a trial run for this approach?*

The consultations infer that the Government will reduce the number of probation areas from the current thirty five. Large private companies are thought to be less interested in bidding for work in small areas but would be interested in bidding for regional contracts. Probation Trusts could be amalgamated to commission at a level that will stimulate the interest of large corporations. This would match the Community Payback approach which divided England and Wales into six areas allowing private operators to bid for larger contracts. It would also fit the Government's reforms to welfare. The Welfare to Work Programme divided Great Britain into eighteen areas. Contractors bid to work in each area. They are paid by results with a small start fee, a job outcomes bonus and a sustainment fee.<sup>23</sup> Eighteen Prime providers were selected to deliver forty Work Programme contracts. Only one prime contractor was from the public sector.<sup>24</sup> In their consultation on community sentences the MOJ say they are developing two pilots with DWP into "*how we can further incentivise Work Programme providers to reduce reoffending.*"

## *Is the work programme a good model for these reforms?*

Analysis by the Social Market Foundation (SMF), credited with inspiring the work programme, suggests that the current Work Programme faces severe difficulties. The SMF warns "*this laudable policy should not be derailed by poor implementation.*" They state that "*Work programme providers will significantly undershoot the minimum performance expected of them by DWP. This implies widespread contract termination and threatens the viability of the entire scheme.*"<sup>25</sup> The Government set a minimum performance target. This was based on economic conditions in the period 2001 to 2008. Economic conditions are currently not as favourable. In light of the deteriorating economic conditions the Government will need to revise this target. The National Audit Office have also criticised the implementation of the Work Programme. Amyas Morse, Head of the National Audit Office says "*The Department [DWP] has set providers stretching performance targets and it needs to ensure that they do not cut corners to stay in profit, such as targeting easy to reach people, reducing service levels or treating sub-contractors unfairly.*"<sup>26</sup>

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<sup>23</sup> Department for Work and Pensions, [The Work Programme](#), August 2011

<sup>24</sup> Department for Work and Pensions, [The Work Programme](#), August 2011

<sup>25</sup> The Social Market Foundation, [Will the Work Programme Work? Examining the future viability of the work programme](#), August 2011

<sup>26</sup> The National Audit Office, [The introduction of the work programme](#), January 2012



## Is there a tension between the ‘Big Society’ and the ‘Total Place’ elements of these proposed reforms?

There is an implicit tension and it exists across the government’s reform proposals. The ‘big society’ element aims to get more involvement by smaller and voluntary sector providers and public sector mutuals to create a diverse market in probation services. The ‘total place’ element includes the creation of large commissioning units and robust contracts done on a payment by results basis that will attract big private sector companies and deliver savings. The former is more risky, it requires greater levels of central government financial support and will take longer to implement. The latter could lead to the bankruptcy of smaller providers and the creation of a Probation Service which lacks accountability for its service provision.

## SECTION FOUR

In this section we will outline what a primary justice approach to probation would look like and how local authorities’ role could be enhanced. We believe local authorities occupy a unique space that allows them to coordinate local partners to innovate new methods of service delivery.

### What is Primary Justice?

In 2009 the LGiU and UNISON cooperated on an APPG Inquiry into Justice in Communities. We developed the concept of Primary Justice. We encouraged local authorities to invest in early prevention initiatives to prevent crime. We envisaged that they would control a devolved budget taken from the funds currently spent on lower risk offenders. Primary justice should be local, community-based and focused on prevention. A local budget could include approximately thirty five per cent of the prison budget, the administration budget for magistrate’s courts, local policing and probation. Upper tier councils would be designated to hold the funds. Professionals would be encouraged to interact with the public as much as possible by feeding into existing “face the public” sessions. We explored the different interventions councils could choose to fund with their new budget. These included; *“a local prison, neighbourhood policing, probation services, hostel accommodation, secure mental health beds, drug and alcohol treatment centre, specialist women’s services, mobile or local magistrate courts, restorative justice teams/panels, coordination services providing links to private sector housing, debt advice, basic skills, employment services, behaviour modification counselling.”* We suggested that *“Local areas*



*should be encouraged to borrow practice from pioneering areas, but not be constrained to deliver a nationally prescribed model.”*

### ***The case for a greater local authority role***

The Government’s proposals reject local councils controlling budgets for probation services. Prisons and probation will continue to be commissioned separately, which is an arbitrary and unnecessary distinction. This is regrettable. Councils are directly accountable for the decisions they make to the local electorate. They could represent the interests of the electors more effectively than the current unaccountable governance arrangements.

Local authorities are not granted any right to direct or influence how probation services are commissioned. There is no mention of how local authorities can employ early prevention schemes and recover any cost savings achieved for government departments. Innovation is limited to government sponsored and directed pilots. A quarter of the budget for probation services has already been reserved for central commissioning. This restricts councils’ ability to fulfil their traditional role coordinating local services. Councils could commission a proportion of Probation Services and/or bid to perform Probation Services perhaps in partnership with Probation Trusts. However the reforms seem likely to regionalise the Probation Service. Successful local authority bids would then rely on councils forming consortia in partnership with the existing public sector staff or private suppliers. This is a difficult proposition given the diverse political composition of each of the regions. Regionalised Probation Trusts will commission according to criteria set down by the Secretary of State and not the communities they serve.

Local authorities given their broad responsibilities covering public health, housing, social work and environmental services could be more effective in providing a joined up response to the multiple issues offenders present. The Carter Report, *Managing Offender, Reducing Crime - a new approach* 2003, recommended a system of “end- to- end offender management” with one manager being responsible for an offender throughout their sentence.<sup>27</sup> A localised Probation Service would allow councils to provide a full package of support by combining local probation teams with their social work staff. There is a significant overlap in the type of individuals that both teams deal with. By co-locating these teams there would be no need for separate premises for probation teams commissioned centrally. Social work staff would not lose contact

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<sup>27</sup> Strategy Unit, *Managing Offenders, Reducing Crime – a new approach*, Correctional Services Review, A New Approach, Lord Carter, 2003.

with individuals when they were sent to prison and could more effectively plan for their release.

A range of small voluntary, charitable and private suppliers already exists in this field so the Government's aim to create a mixed market in provision could be easily achieved. Democratic accountability would be provided by councillors. Decisions to invest in early prevention schemes could be made by councils, who would know that failure to deal with problems early would increase demand for supervision services later on.

Councils could also design more effective payment structures. A pure payment by results system could affect the capacity of public sector and small and voluntary bodies to bid to perform these services. The National Council Voluntary Organisations highlight "*concerns that primes [prime contractors] will not pass on sufficient upfront fees to their subcontractor partners, many of whom will be financially vulnerable 'niche' providers unable to wait for the delay in payment associated with a Payment by Results system.*"<sup>28</sup> Cash flow is a key reason why small firms go bankrupt. The MOJ will need to ensure that subcontractors are not forced to absorb a disproportionate share of costs or suffer delayed payments to stimulate a more diverse market. The Work Programme threatens the survival of small scale private suppliers of work based services, if similar methods are applied in the probation sector a diverse range of suppliers may not be created at all.

Combined with the reforms to prison services, the Government needs to consider how new providers can ensure continuity of service in any changeover period. Contact with the offender is recognised as a key factor in ensuring the success of community sentences. The MOJ needs to outline how these proposals will create a joined up Probation Service. The danger is that individual interventions are assigned to multiple providers without appropriate coordination. Offenders problems become the responsibility of many agencies but offenders themselves are seen as the charge of no-one. Commissioning both local prison and probation services by local authorities would allow councils to experiment and produce a range of partnerships that deliver for local citizens.

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<sup>28</sup> NCVO, [The Work Programme: Initial concerns from civil society organisations](#), October 2011.

## CONCLUSION

Our proposals offer a practical vision of local commissioning which can be implemented quickly and that will improve service delivery through encouraging the formation of strong local partnerships. There is no easy resolution of the tension between the 'Big Society' and the 'Total Place' elements of these reforms. Both visions reflect different ideas about the proper association between the citizen and the government. Our vision is of local authorities exercising greater control and coordination to deliver lower levels of crime and better value for money. Local authorities can then make their own choice between the Big Society and Total Place visions and citizens will be able to judge the results democratically.

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22 Upper Woburn Place  
London WC1H 0TB  
t: 020 7554 2800  
e: [info@lgiu.org.uk](mailto:info@lgiu.org.uk)  
[www.lgiu.org.uk](http://www.lgiu.org.uk)